

A newsletter by **Taheri & Todoro, P.C.**, devoted to Driving While Intoxicated law in New York State
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Definition of Common Law DWI

Intoxication without a Breath Test

When a driver arrested for an alcohol-related offense refuses to submit to a breath test or blood test and there is no court order to obtain a test result, the prosecution must attempt to prove the driver's intoxication or impairment through other means. These means usually include introducing evidence of poor driving, the driver's physical appearance, and the driver's performance on any field tests.

While the New York State Vehicle and Traffic Law clearly defines the blood alcohol content an individual may have before being considered intoxicated or impaired by alcohol, there is no statutory provision in New York State setting forth the definitions of intoxication or impairment in the absence of a blood alcohol content score. As a result, it has been left to the courts to craft a definition of these conditions.

What is intoxication?

In *People v Cruz*, 48 N.Y.2d 419 (1979), the Court of Appeals provided that to establish "intoxication" under VTL § 1192[3], the prosecution must prove beyond a reasonable doubt that the defendant has "voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver," *Cruz*, N.Y.2d at 423.

Along with providing a definition, the *Cruz* court provided several examples of the extent to which a driver's skills must be diminished before it may be concluded that a driver is "intoxicated":

But the standard for determining intoxication is constant; that is, whether the individual's consumption of alcohol has rendered him incapable of employing the physical or mental abilities needed to, for instance, form a specific intent ... understand the nature and effect of a contract or testify truthfully and accurately. *Cruz*, N.Y.2d at 427-28.

Although a trial court will usually charge a jury with the language found in *Cruz, supra*, that is not the only language the Court of Appeals has found acceptable. In *People v. Ardila*, 85 N.Y.2d 846 (1995), defense counsel objected to a jury instruction which described intoxication in language that varied from the definition set forth in *Cruz*. The trial court in its jury instructions defined voluntary intoxication as the voluntary consumption of alcohol to the extent that a person's "ability to drive safely is impaired to a substantial extent," *Ardila*, N.Y.2d at 847. In rejecting defense counsel's challenge, the court held:

Contrary to defendant's contention, there is no meaningful semantic difference between being so inebriated that one's "ability to drive safely is impaired to a substantial extent" — the formula used by the trial court here — and being so inebriated that one is "incapable of employing the physical and mental abilities which [one] is expected to possess in order to operate a vehicle as a reasonable and prudent driver" — the formula used by this Court in *People v. Cruz* (48

N.Y.2d 419, 428). While the term "incapable" may connote absolute inability in the abstract, it loses that unconditional quality when it is used in conjunction with a relative concept like operating a vehicle in a "reasonable and prudent" manner....

Ardila, 85 N.Y.2d at 847.

What constitutes "impairment"?

Cruz, supra, also set forth the formula for determining "impairment" under VTL § 1192[1]. In distinguishing between these two offenses, the court held that a driver is "impaired" when the voluntary consumption of alcohol has:

[A]ctually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

Cruz, 48 N.Y.2d at 420.

In *People v. Monk*, 177 A.D.2d 602 (2d Dept. 1991) a jury convicted the defendant of DWAI. In concluding that the trial evidence was legally sufficient and the jury's verdict was not against the weight of the evidence, the court wrote:

In addition to the testimony of the police witnesses, there was testimony from several other witnesses that the defendant staggered when he walked, had an impaired sense of balance, had slurred speech, bloodshot eyes and an odor of alcohol on his breath. Additionally, defendant admitted that he consumed "a few drinks."

Monk, 177 A.D.2d at 603.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact Michael S. Taheri, Esq., or Peter J. Todoro, Esq., at Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, telephone no. (716) 633-0374, e-mail: taheri@localnet.com.

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